# APPENDIX A

[223]

## OPINION

After 105 days of jury trial, the defendants, Morrison T. Wade, and Bessie Lou Tanner Wade, on September 14, 1951, were found guilty on each of the four counts of an information charging them with (Count One) conspiracy to cheat and defraud; (Count Two) conspiracy to obtain property under false pretenses; (Count Three) gross fraud and cheat; (Count Four) obtaining property under false pretenses. This case involves the claimed acts of the defendants in obtaining, handling and disposing of certain moneys, goods, things of value from the citizens of Detroit through and by means of the use of the offices, equipment, staff, books, records and bank accounts of The Society of Good Neighbors, a non-profit corporation. Certain phases of some of the background of this case and the one-man grand jury proceedings out of which the complaint herein issued have already been before the Supreme Court of Michigan and the Federal Courts. See: *Society of Good Neighbors* v. *Mayor of Detroit,* 324 Mich. 22; *MacGriff* v. *Toy,* 327 Mich. 200; *MacGriff* v. *Van Antwerp,* 327 Mich. 200; *Wade* v. *McNally,* 327 Mich. 200; *Society of Good Neighbors* v. *Groat, Judge of Recorder's Court et al,* 77 Fed. Supp. 695.

The defendants filed a Motion for New Trial claiming 61 grounds therefor and have added 107 more claimed reasons in a Supplement to Motion for New Trial for the filing of which leave was granted. The Court will consider the 168 claimed reasons in the order listed in the Motion and Supplement unless otherwise hereinafter indicated. However, inasmuch as there is a duplication of numbers in the Motion and Supplement it will be necessary to consider them under separate divisions of this opinion, the numbers herein corresponding to the respective paragraph numbers of the Motion or Supplement.

## MOTION FOR NEW TRIAL

—1 and 2—

1 and 2, Defendants claim that the so-called one-man grand jury law (C.L. 1929, Sections 17217 and 17218; Stat. Ann. Sections 28.943 and 28.944) was unconstitutional as being in violation of Section 4 of Article IV of, and Section 1 of, the 14th Amendment to the Constitution of the United States is untenable. Re: *Slattery*, 310 Mich. 458; *People* v. *Hancock*, 326 Mich. 471 at 478 and 491.

In *In Re Slattery*, 310 Mich. 458 at 466, the Michigan Supreme Court said:

> "When a complaint has been filed by the Attorney General, it became incumbent upon the judge as a circuit Judge to make an investigation. He was neither a prosecuting attorney, policeman or detective. He had judicial duties to perform and he proceeded in a judicial capacity."

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3. Defendant's objection that the failure to file a sworn complaint or indictment prior to issuance of process was a denial [224] of equal protection of the laws and violation of due process under Section 1 of the 14th Amendment to the Constitution of the United States is untenable for the reason that the so-called one-man grand jury statute did not require any other sworn complaint than that provided for in Section 17218, Compiled Laws of 1929, (Stat. Ann. Section 28.944) which procedure was followed in the present case: a complaint by the then attorney general of Michigan and the then prosecuting attorney of Wayne County, sworn to before a notary public, was filed and an order granting a grand jury investigation was thereupon entered, followed by the taking of testimony in the grand jury chambers. Certainly this fully complied with the cited Section 1 of said 14th Amendment. As stated in *People* v. *Kert*, 304 Mich. 148 at 158:

> "The grand jury warrant took the place of an indictment, which under the Code of Criminal procedure,

3 Comp. Laws 1939, Sec. 17118 (Stat. Ann. Sec. 28.843), includes the words information, presentment, complaint, warrant and any other formal written accusation."

In *People* v. *Berry*, 107 Mich. 256, and *People* v. *Bennett*, 107 Mich. 430 at 432, it was held that a written complaint was unnecessary before issuance by magistrate of the warrant. Finally, it was held in *People* v. *Griswold*, 64 Mich. 723:

> "While an omission to secure an order from the prosecuting attorney before issuing process in criminal cases might subject the magistrate to censure, and, possibly in some cases to pecuniary injury and official embarrassment, it was never intended to deprive the court of jurisdiction in any case."

In *People* v. *Pichette*, 111 Mich. 461, the court said:

> "The proceedings before the justice are preliminary and law does not require that technical accuracy necessary in an indictment or information. The complaint in cases not cognizable by a justice of the peace need be little more than verbal information of a supposed wrong. This is followed by an examination under oath of the complainant and of other witnesses if deemed necessary, and the magistrate then issues his warrant."

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4. The objection that the process was so vague and indefinite as to violate Section 19, Article II, and Section 1 of the 14th Amendment to the Federal Constitution is groundless, as appears by reference to the process itself, containing four explicit and extended counts.

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5. Defendants' assertion that the process is neither a warrant nor indictment and is therefore in violation of

Section 1 of said 14th Amendment is refuted by examination of the process which in form and content is a warrant, being styled "In the name [225] of the People of the State of Michigan" as required by Section 22 of Article VII, Constitution of Michigan of 1908, and signed by Recorders Court Judge Gerald W. Groat "Acting under sections 17217 and 17218 of the Compiled Laws of the State of Michigan for the year 1929, and any additions and Amendments thereto, with seal of the Court affixed thereto, all in conformity with Section 13.541 Comp. Laws 1929 (Section 27.35 Stat. Ann.").

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6. Contrary to Defendants' claim that the process is not properly styled in conformity to Section 22 of Art. VII of Constitution of Michigan for 1908, examination of the warrant's last paragraph shows it is styled in accordance with said Section 22, as follows:

> "THEREFORE in the name of the People of the State of Michigan, you and each of you are commended" etc.

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7. Defendants' claim that the one-man grand jury law violates Section 1 and 2 of Article IV of the Michigan Constitution is unfounded. *People* v. *Hancock*, 326 Mich. 471.

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8. Contrary to defendants' claim that the process does not set forth any crime cognizable under the laws of Michigan or under the common law, examination of said process shows that four distinct offenses are separately set forth, viz.: conspiracy to cheat and defraud, conspiracy to obtain property under false pretenses, gross fraud and cheat, obtaining property under false pretenses. (For further discussion relative to the allegations of each of these offenses see paragraph 25 hereinafter wherein is considered the information which follows the wording of the process.)

—9—

9. Defendants' objection that Judge Groat "had no authority . . . to proceed as a one-man grand jury because he failed to take the oath of a grand juror" as required by Sections 17218 and 17223 of the Compiled Laws of the State of Michigan for 1929 (Stat. Ann. Sections 28.944 and 28.949) is unfounded, for the reason that said Sections do not require any oath to be administered to the judge acting under said section. The provision " . . . in respect of communicating or divulging any statement made by such witness during the cause of such inquiry, the judge . . . shall be governed by the provisions of law relating to grand jurors" cannot be given a forced meaning. "Govern", according to Webster's International Dictionary, means "to regulate by authority", to "direct or control"; it should not be construed to mean that the oath prescribed in section 17223 of Comp. Laws of 1929 (Stat. Ann. Sec. 28.949) required of members of a panel of a 23-man grand jury be administered to a judge who has already taken the only oath of his office required by law. The oath contained in said Section 17223 is suitable only for members of the panel; it covers the whole proceedings [226] of such a jury and is not restricted to "communicating or divulging any statements" as is Section 17223, which should be considered as moreproperly referring t Section 17233, Comp. Laws 1929 (Stat. Ann. Section 28.959) which specifically controls the extent to which and conditions under which grand jury members may be required to disclose testimony given before them. See *Oakman* v. *Recorder of Detroit*, 207 Mich. 15.

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10. No effort collaterally to attack the legal existence (or charter) of the Society of Good Neighbors, a Michigan non-profit corporation, as claimed by Defendants, is disclosed in the process. It specifically names defendants as the claimed offenders.

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11. A review of the transcript of the preliminary examination establishes the existence of probable cause, contrary to defendants' claim.

12. The twenty-one reasons for the motion to dismiss filed December 29, 1948, at the close of the preliminary examination were all found unsubstantiated and the motion was denied by Recorders Court Judge Arthur E. Gordon on October 26, 1949, and the writer considers that Section 16291 of Comp. Laws of 1929 (Stat. Ann. Sec. 27.3552) which in part is as follows, as to Recorder's Court:

> "... No judge of said Court shall review or revise any order, judgment, sentence or act of any other judge of said Court, involving the personal discretion, judgment, or opinion of such other judge",

precludes this trial judge from reviewing Judge Gordon's decision on said motion to dismiss. However, so that nothing may appear to remain undecided, and solely for the purpose of this motion for a new trial the following holding is made as to each of the 21 subdivisions of said reason 11 in said motion for new trial (the Roman numerals refer to the corresponding reasons listed therein):

I, II. These reasons are similar to those stated in defendant's reason 1, discussed and held untenable in paragraphs 1 and 2 above.

III. This reason is similar to that asserted in defendant's reason No. 7 and is discussed and held untenable in paragraph 7 above.

IV. Defendants' claims that a judge of the Recorders Court has no right to act as a grand jury for the County of Wayne and that criminal cases can only be initiated upon indictments found by a jury of Wayne County or by the filing of an information by the prosecuting attorney thereof are untenable. Here the investigation was of alleged crime *in the City of Detroit* in which [227] a Recorder's Judge has jurisdiction (Comp. Laws 1929, Sec. 16300, Stat. Ann. Sec. 27.3561); a Recorder's Judge may act as a so-called one man grand juror (*In re Investigation of Recount*, 270 Mich. 328 at 330) and under the one-man grand jury statute (Comp. Laws 1929 Sec. 17217, Stat. Ann. Sec. 28.943 et

seq) the complaint "may be made by anyone and neither the prosecuting attorney of the County of Wayne nor the attorney general of the State of Michigan is a necessary party complainant." *In re Investigation of Recount*, supra, at 330. Nor is it necessary that criminal cases be initiated by a Wayne County jury or by the filing of an information by the prosecuting attorney. The warrant of the judge acting as a so-called one-man grand juror is sufficient. *People* v. *Kerr*, 304 Mich. 148 at 158.

V. This claim is discussed and held unfounded in paragraph 8 above.

VI. This claim is discussed and held unfounded in paragraph 9 above.

VII. This claim is untenable because the one-man grand juror's warrant is sufficient, *People* v. *Kert*, 304 Mich. 148 at 158.

VIII. This claim is discussed and held unfounded in paragraph 4 above.

IX. The claim that the process is so general, vague and indefinite in its terms as to make it impossible for the defendants to prepare for the examination is refuted by an inspection of the allegations of the process and by the fact that the preliminary examination before Judge George Murphy by Recorder's Court consumed some 54 days during which, as appears from the transcript, the defendants had ample opportunity, had such been needed, to explore all possible claims of the prosecution.

X. The claim that the process is an attempt to collaterally attack the legal existence of the aforesaid Society of Good Neighbors is discussed in paragraph 10 hereinabove, and found untenable.

XI. The claim that the process is neither a warrant nor an indictment is disposed of in paragraph 5 above.

XII. The claim that the process is not entitled, etc., is disposed of in paragraph 6 above.

XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI. These nine asserted reasons are wholly unfounded in the

transcript of the examination or in the testimony on the trial.

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13. The defendants' claim that the court erred in denying defendants' motion to dismiss filed May 12, 1949, is unfounded. This motion was denied by Recorder's Judge Arthur E. Gordon which ruling cannot be reviewed by this court under the above [228] cited Section 16291 of Comp. Laws of 1929 (Stat. Ann. Sec. 27.3552). However for the purposes of this motion for new trial and that nothing may remain undecided herein the court will consider each reason set up in said motion to dismiss. (The paragraph numbers follow those of the said motion to dismiss as included in reason No. 13 of the motion for new trial):

I(a). Defendants' objection to the use of the subpoena duces tecum by the so-called one-man grand juror is unfounded. The books, records and papers were properly brought before the one-man grand juror by such subpoena which was the only authorized means of accomplishing the result. *Comp. Laws 1929 Sec. 17217, Stat. Ann. Sec. 28.943.* Furthermore the testimony of Jacob Friedman of the Michigan Unemployment Commission and Lieutenant Nowlin of the Detroit Police Department is convincing that Morrison T. Wade consented to the records being taken in the beginning. Finally Morrison T. Wade was cited for contempt by the one-man grand juror for refusal to bring in certain books, was fined $100.00 for the contempt and the fine was sustained by the Michigan Supreme Court which refused leave to appeal from the order therefor. The retention of said books, record and papers by the prosecuting attorney was merely the retention in his control of the evidence necessary on the trial of the cause. The defendants, during the 105 days of trial extending over a period of seven and one-half months, were accorded every opportunity to examine the papers, and *all of them*, during *every* hour the court was in session. In addition to this continuous and complete availability of all records for use by de-

fendants during court hours, the court repeatedly made arrangements for the defendants and their counsel—whenever they so requested—to have the privilege of having all files and records (there were 13 four-drawer letter files, numerous paper filled cartons, ledgers, check book stubs and miscellaneous papers) hand trucked into the court room from the nearby storage room on Mondays or other days on which the trial was not in progress, and at hours convenient to defendants, their auditor and attorneys, so that defendants might have access to all records and the necessary tables and chairs for convenient inspection of, and copying from, said records. Furthermore, owing to the illness of defendant Bessie Lou Wade the trial was adjourned from March 6th to March 20th during which period added periods were requested by, and granted to, defendants' counsel for examination of the records. Every day all the records were present in court, open for use by defendants and their attorneys. Attorney Sloman for many days, hours at a time, *in the presence of the court and jury* worked in the files. Such was true, but for a shorter period, as to the witness Oliver Fluke, the defendants' auditor. The trial opened January 23, 1951, the people rested July 11, 1951, the defendant commenced its testimony July 17, 1951. Thus all the records were available to the defendants, their attorneys and auditors for over four months before the prosecution rested. During the cross examination of the people's witnesses every paper, check, check stub, ledger [229] sheet was presented to defendants' counsel literally within a few moments of the time said counsel made request therefor with the exception of one unimportant document concerning the prior existence of which the defense testimony was very weak, and the police officers denied ever having seen it. The defense had more than ample opportunity afforded for the preparation of its case as far as the access to records and papers was involved.

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14. Defendants' claim of error based on the denial by Judge Gordon of defendants' Supplemental Motion to dismiss and to suppress the evidence and quash the information is unfounded. [230] Although this trial judge is precluded from reviewing said denial (Sec. 16291 of Comp. Laws of 1929, Stat. Ann. Sec. 28.3552) the court, solely for the purpose of this motion for a new trial and to preclude any matter remaining undecided herein, specifically considers each subdivision of said Reason No. 14:

I. Contrary to the claim of defendants, the record is clear that the books and records of the Society of Good Neighbors were lawfully subpoenaed before the one-man grand jury under *subpoena duces tecum* without any illegal search or seizure.

II. Contrary to defendants' claim the retention of the records of the Society of Good Neighbors by the prosecuting attorney was a lawful control of exhibits to be used in evidence on the trial and the motion to dismiss and suppress the evidence was properly denied.

III. The prosecuting attorney's refusal to accede to demand by Society of Good Neighbors for the return of the books and record is no valid ground for dismissal, especially inasmuch as the retention of said records for use as evidence on the trial was proper and necessary.

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[233] 22. There is no merit in defendants' claim of error to the effect that defendants were not permitted free access to the books and records of the Society of Good Neighbors during the trial as set forth in paragraph 13 I(a) hereinbefore, the said books and records were the principal evidence of the people, and absolutely necessary to a proper presentation of the people's case. Therefore, it was proper that said books and records be kept under the supervision of the officers. Defendants, their attorneys and their auditor, had free access to said books and records during court hours during the entire trial and repeated days when there was no court were set aside for defendants, their attorneys

and auditor to have the use of the court room, where all the file cabinets and boxes of records and books were hand-trucked by the officers so that the defendants might have the opportunity to examine and copy any record or document they saw fit. *At no time* during the entire trial was either defendant, their attorneys or auditor denied access to any document, any book, any record or any drawer or box in which any record was stored. For further discussion of this matter see said paragraph 13 I(a) hereinbefore.

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[237] —26—

26. The defendants claim error in the denial of the Motion for a directed verdict.

I. This claim of error is untenable for the reason there was sufficient evidence from which the jury could find the existence of a conspiracy as alleged in the first count of the information. There was testimony [238] that the two defendants without exception controlled the corporate set-up of the Society of Good Neighbors, that a retroactive salary increase and expense account were voted to Morrison T. Wade when only three members of the board of directors were present, two of whom were Mr. and Mrs. Wade, that the Society's bank account was under the exclusive control of Mr. and Mrs. Wade, that the books of the Society were kept in accordance with Mr. Wade's orders; that Morrison T. Wade throughout the trial claimed the Society owed him money for back salary and funds advanced during the same year that the Society's own books listed his account as overdrawn. For instance, Exhibit 112A which is a Society of Good Neighbors check, #12783, drawn on the National Bank of Detroit, dated February 6, 1945, for $500.00, payable to order of Morrison T. Wade, was endorsed by Wade and by E. C. Dittrich & Co., Inc. The check stub #12783, from Exhibit 97, shows "Order of Morrison T. Wade" "For Cont. pro". Page 7 of Exhibit 75-A (Society's check register) shows check #12783 posted under "Cont. pro." "charge to Morrison T. Wade". Page 11 of Exhibit 75-A shows total for "Cont. pro." for February 1945 to be $523.00. Page 280 of Ex-

hibit 71, the Society's ledger, shows the total of $523.00 posted under "Contribution promotion" as brought forward from the C R (check register—Exhibit 75-A). There was testimony that this $500.00 check was applied by E. C. Dittrich & Co., Inc., upon the account of Morrison T. Wade for a mink coat for Mrs. Wade. Thus the $500.00 item shown on the Society's books as charged to "Contribution Promotion" was actually used for Mrs. Wade's mink coat. This "contribution promotion" account in the Society's ledger was shown in the testimony to have been used for other items of a similar nature. Again check #12811, Exhibit 112-B in the amount of $510.00, dated February 10, 1945, was drawn on the same bank as #12783, and like the latter, was payable to order of Morrison T. Wade and endorsed by him and E. C. Dittrich & Co., Inc. The check stub of #12811 showed "for $400.00 loan to S. G. N., $110.00 Emp. Wel. (Gifts for Sns)".

"Emp. Wel." was shown to refer to Employees' Welfare. The Check Register, page 8 of Exhibit 75-A for February 1945 shows $110.00 "charge to Morrison T. Wade 'E.W.'" (Employees' Welfare) and $400.00 placed in column headed "Dr. M.T.W." The jury could well have been impressed that this check eventually used to apply to the account for furs for Mrs. Wade, at E. C. Dittrich & Co., Inc., was not a true *employees' welfare* item. Furthermore, this check #12811 was included in the column total of $2127.45 headed "M.T.W." on page 11 of Exhibit 75-A (check register) and said $2127.45 is posted in the Morrison T. Wade debit column on page 121 of the ledger, Exhibit 71, the balance column for February 1945 being $182.02, *and in the red.* Another check #12497 (Exhibit 112F) for $275.00 dated December 14, 1944, payable to Morrison T. Wade and endorsed by him and E. C. Dittrich & Co., Inc., according to the check stub, was "for [239] cont. pro.—envelopes & post" and was charged to postage in the ledger, but actually credited to the account for furs. All of these checks were signed on behalf of the Society by Mr. Wade personally, indicating his personal knowledge thereof. When it is considered that, according to the testimony of Jack Friedman, from Exhibit BB-4, the 1945 drawings of

the two defendants totaled $13,200.70, the "contribution promotion" account at times, at least, appears to have been a convenient cover for checks drawn for the personal use of one or both of the defendants.

II. This claim is untenable for the reason that the prosecution adduced testimony from which the jury could have found each item therein established. There was an accumulation of credible testimony to the effect that (1) there were repeated representations by the Wades, and especially by Morrison T. Wade, that the entire efforts of the Society of Good Neighbors were expended charitably in the interest of the needy of the City of Detroit; (2) that on certain dates, for instance, calls were made by radio and otherwise for specific items, such as a stove, a dresser, a refrigerator for a certain needy person, or family, when the records of the Society showed that on that date and on dates immediately before and after said date a number of the same items were being sold through the Society store; that, for instance, refrigerators for the needy were called for at the same time that nearly a box car load of stoves and refrigerators were being sold to a second-hand dealer; that second-hand dealers met the trucks sent out to collect the merchandise donated, and made purchases from the trucks or before the donated articles were made available to the needy; that according to one witness she responded to a radio call by Mr. Wade for a certain type of dress for a certain needy person, gave her own dress to the Society's truck driver sent to pick it up, and later found said dress up for sale in the Society store; that the *Wades had no personal bank account* but used the Society's checking account indiscriminately for their own business transactions. There was also testimony; that the gross receipts from bingo games were never entered in the records or accounts or the sums of money in the bag (taken from the Moose Hall where the bingo was played) after numerous expense items were admittedly paid, such as the floor workers and the musicians; that one witness testified hearing Wade say the night before they had taken in $13,000.00, although never was any comparable amount shown in the books; that the witness, George Alder, Wade's assistant, admitted

writing a letter to the Office of Price Administration stating that the crowds playing bingo averaged 1000 nightly; that the only accounting of the total receipts shown on the trial or even hinted at by any witness as being in existence other than the ledger showing which was not of the total gross receipts, was a paper, Exhibit 206-A, in handwriting of witness [240] O'Toole, which was a statement of bingo receipts and expenses given O'Toole from the Society's books for part of the period of nights on which the bingo was run by the Northwest War Council but under Wade's direction (after the Detroit Police had compelled the Society to give up two of the three nights per week of bingo play, the Northwest War Council taking one night and the Redford War Memorial taking the other), showed that the gross income from said bingo was $32,135.55 of which the Northwest War Council received only $917.55; that witness O'Toole testified he checked the books and records of the Society to obtain the figures contained in said Exhibit 206-A. Witness George Alder testified that the gross income of the pantry, operated by the Society under Wade's direction, at the bingo games totaled from $50.00 to $200.00 per night.

There was extensive testimony to the effect that the two defendants worked together in the enterprise, that both were on the board of directors of the Society, that expense allowances and retroactive increase in salary were allowed *pro forma* by the said board when the two defendants were two of the three directors present at the meetings, that the defendants participated with others, named as co-conspirators such as Ann Bruening and Edith Brown, in selling the merchandise gathered from donors, directly from the trucks. A *prima facie* case of conspiracy both under counts one and two was shown.

III and IV. These claims are untenable. There was not only a showing of conspiracy but the acts of the defendants themselves were sufficient to establish a *prima facie* case under each of counts three and four.

V. This claim is untenable because there was testimony tending to show that defendants used the skeleton or frame-

work of the Society of Good Neighbors as a "front" or instrument to effect their fraudulent purposes.

VI. This claim is untenable. There were many items of testimony tending to show false representations such as radio appeals by Morrison T. Wade, that certain items as refrigerators, dresses, bureaus were necessary for specific cases, and such was not the truth—for instance, stoves and refrigerators were called for by people, which stoves and refrigerators actually were intended to be sold to second-hand or junk dealers and not merely as surplus after charity cases were supplied.

VII. This claim is untenable. For discussion see immediately preceding paragraphs of this Reason No. 26.

VIII. This claim is groundless. Such was not the theory of the prosecution.

IX. This claim is groundless. Its statement is of such a general nature, without support in the record, seen by reference to the testimony of Jacob Friedman.

[241] X, XI. These claims of error are untenable and no ground for a new trial or a directed verdict.

XII. This claim of error is too general to be seriously considered. The prosecution called 90 witnesses including most of the employees of the Society of Good Neighbors employed during the period covered by the information. For further discussion of this point see paragraph No. 23 hereinbefore.

XIII. This claim is untenable. What the defense really seeks is that the prosecution be bound by the defendants' *interpretation* of the books and records of the Society. For instance, the ledger account entitled "contributions promotion" was such as to be subjected to explanation. For instance, at one time a $1092 loaned to M. T. Wade was transferred to the contribution-promotion account, and the ledger entries of the building fund of $500.00 at one time and a $1000.00 at another were subject to interpretation especially when there was no testimony showing the continued

actual existence of such a fund. The foregoing references to testimony are merely illustrative.

XIV. This claim is untenable. For further discussion see preceding sub-paragraphs of this paragraph No. 26.

XV. This claim is untenable. For further discussion see paragraph No. 23 hereinbefore.

XVI. This claim is untenable. There was abundant testimony from which the jury could find that Morrison T. Wade's account with the Society was overdrawn and no back salary owed him on numerous occasions when Society checks were used by him to pay his personal expenses. For further discussion see sub-paragraphs I and II of this paragraph 26. Furthermore, according to Oliver Fluke, the Society's auditor who was relied upon by defendants during the trial, Wade withdrew around $44,000.00 from the Society of Good Neighbors in 1946, and he also testified Wade loaned the Society $22,000.00 that same year; also that on May 30, 1946, Wade's overdraft was $9477.14 while on June 30, 1946, the books showed an item of $4620.00 *to* the Society from Wade which Fluke claimed was a loan to the *Society* (see Fluke's testimony). Fluke also testified Wade's overdraft as shown in the ledger on June 30, 1946, was $7499.80 and that in the ledger in *Fluke's own handwriting* Wade's overdraft at the close of 1946 was $8681.34; and further that the books showed a loan from the Society to Wade of $3000.00 at one time. Fluke further testified that just looking at 1946 balance sheet of the Society one could not get a correct idea of its financial condition. Again the foregoing items are merely illustrative of and only a very small part of very extended testimony to the same effect.

XVII. This claim is untenable. Under date of January 13, [242] 1943, defendant, M. T. Wade, wrote a confidential letter to the Society's bookkeeper, Herman Gluer (Exhibit 81-B), in which Wade directed the opening of the "contribution-promotion" expense account. Thus this very unusual account which contained so many personal expense items of the Wades was ordered opened by Mr. Wade him-

self. These and allied items went to the question of fraudulently made entries in the books.

XVIII. This claim is groundless especially in the light of Exhibit 81-B, a letter by Morrison T. Wade to the bookkeeper, Herman Gluer, directing him to open the "contribution-promotion" expense account. The honesty of the defendants certainly was put in question by a multitude of items of testimony.

XIX. This claim is untenable. For further discussion see foregoing sub-paragraphs of this paragraph No. 26.

XX. This claim of error is absolutely contrary to the testimony of every witness who had anything to do with the books. See sub-paragraphs XVII and XVIII of this paragraph 26 hereinabove. Everyone having anything to do with the bookkeeping indicated: (1) on any questions of entries Mr. Wade's word was final; (2) that the bingo expenses were set by Mr. Wade; (3) that Mrs. Wade herself worked on the books for at least some months; (4) that most checks were signed either by Mr. or Mrs. Wade; (5) that Mr. Wade was the bingo manager, who received the bingo worksheets from witness Edith Brown.

XXI. This claim of error is untenable. In any event the mingling of the Society's funds with those of "any other organization" of itself was not such an issue as would entitle defendants either to a directed verdict or a new trial. However there was testimony from which the jury could have found:

(1) That the Society funds were used to pay bills of other Wade controlled corporations;

(2) That loans or advances to and from the Society's accounts from and to these other Wade controlled corporations was such that an almost hopeless confusion of funds resulted;

(3) That the Society's trucks and Society paid employees were furnished the one or more other Wade controlled enterprises (in such a way that the jury could have found such to be an improper expenditure

of Society funds or use of Society property). Again these are merely illustrative instances.

XXII. This claim is untenable. That Mrs. Wade acted as posting clerk under the direction of Ed Brannan, the Society Auditor, is no ground for a directed verdict or [243] a new trial. However, Mrs. Wade was a director of the Society, that for a considerable time she was its Vice-President and prepared to take over its management in the event Mr. Wade were drafted into the Armed Services, and she admitted receiving a mink coat, a sable scarf. She also testified (July 31, 1951, afternoon) that she wrongly charged a Society's check dated March 30, 1946, payable to Sachs Fifth Avenue Store (Exhibit 122-A) to have been charged to Mr. Wade's account.

XXIII. This claim of error is untenable. The most that could be claimed for Brannan's testimony was that it went to the question of fact as to the use of the funds.

XXIV. This claim is untenable. See foregoing discussion in sub-paragraphs I and II of this paragraph No. 26, hereinbefore.

XXV, XXVI. These claims are untenable and need no further discussion.

XXVII. This claim is untenable for the reason that the testimony of Brannan, Gluer at most contributed to a question of fact which was a jury question.

XXVIII. This claim is untenable. As an instance of the way the defendants received something of value from the public the testimony showed that (1) Mr. Wade made direct appeals over the radio for certain specific items for certain cases, (2) that people contributed such items of merchandise for such items of assigned use, (3) that the identical items were sold and not used for the specific purpose, (4) that the proceeds from the sale went into the Society bank account which was the bank account shown to be used by Wade for his personal and family expenses.

XXIX. This claim is untenable. No further discussion is necessary.

XXX. This ground is untenable and, being an "omnibus" claim, is discussed in the preceding and succeeding paragraphs of this opinion.

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27. Defendants claim error because of a statement by the court *in the absence of the jury* as a part of the decision on the motion for a directed verdict. The statement is completely supported by the testimony and record at that time, which was the close of the people's case. It was still a correct statement at the close of defendants' proofs. There is abundant testimony from which the conclusion may be properly drawn that these two defendants were in fact the Society of Good Neighbors, that they used the articles collected and the proceeds from the sale [244] thereof as they saw fit; that they did donate articles to welfare and worthy cases but that they retained for their own purposes such as the establishment and operation of the various Wade enterprises (such as Holiday House, Inc., a flower and gift shop; Recreation, Inc., which had concessions at Dodge Park; and Chase-Wade Corporation which was an attempt to set up a speed boat enterprise), a large share of the money and proceeds which was far in excess of any proper operational expense, and that all of this was done in furtherance of a deliberate plan to obtain for their own selves money and property from the citizens of Detroit by representing that the whole enterprise was entirely charitable. The appeal made for gas stoves for needy cases which appeal actually was made to fill the box-car of stoves sold to witness Jacoby is but one example in a great many of the methods used to defraud the givers who were not responding by giving their stoves in order to increase the amount of cash in the Society's bank account which was being kept low by withdrawals for a $100.00 hat for Morrison T. Wade or a mink coat for Mrs. Wade.

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[246] —38—

38. The defendants' claim that the court erred in failing to make an investigation of jury tampering is contrary to

fact. The court did make such an investigation and called in the attorneys and the two defendants, and, after a discussion, the court indicated that "if Mr. Davidow and Mr. Sloman felt that they should have a mistrial, that the court was willing to grant it." Mrs. Wade said, ". . . we do not want a mistrial in any way," and the court later said, "I am perhaps too liberal in saying 'I will grant a mistrial', because as far as I am concerned there must never be anything appearing" and Mrs. Wade interrupted the court to say, "We don't want it, Your Honor," and the following then took place:

> "The Court: —in actuality or by mere aroma of appearance to have anything that anywhere broaches, not alone tampering with the jury, but any unusual situation with regard to the jury, so that is why I have said and I will repeat it still, if there is any feeling on the part of either of you people or your counsel you should have a mistrial, I certainly would grant it because I don't feel that there has been anything done, that, so far as *I found from the investigation* and your attorneys have heard every word that either juror has said to me—
>
> "Mr. Wade: I filed a motion of prejudice. We have been through three years of this. We knew what to anticipate and do before this came to trial. I don't care how many jurors are approached. Our position we feel is so secure that no juror can be prejudiced, and I don't care what it comes to.
>
> "Mrs. Wade: Can there be an investigation on this, can this be followed through?
>
> "The Court: I shall do that. Of course, we have the business of the Court. Not only shall I but I am doing it and I, after suggestion of your counsel, I do not want at the time being to stop the wheels of the judicial procedure here because after all that is the same as a mistrial.
>
> "Mr. Davidow: We want the case to go on just as it is."

Mr. Bolio, the assistant prosecutor, then stated that the prosecution would "not oppose" a mistrial after which Mr. Davidow stated:

> "I want to say this on behalf of these defendants; I stated not in their presence before *we are anxious to avoid a mistrial.* We want this case brought to a conclusion and have it ended, and we shall cooperate with the Court to the limit to bring about that result."

As stated by the court on the hearing on the Motion for a new trial, the court did investigate and "found that there was nothing as far as the court can see or ascertain that happened with any juror; no report came to the court of any such happening at least subsequent to February 3 and there was nothing further to be done with respect to it."

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[252] SUPPLEMENTAL MOTION

Hereinafter the court considers the reasons and grounds for new trial set forth in Defendants' Supplemental Motion therefor.

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[253] 3—Supplemental

3. Defendants claim that a juror, Isabel Eschelman, falsely represented to the court on the voir dire that (1) she did not know one of the witnesses, Walter E. Kutch. The following took place on the voir dire after the prospective jurors had had an opportunity to examine the list of endorsed witnesses for the prosecution among which the name of Walter E. Kutch appeared.

> "The Court: Do any of you seated in the box know any of the persons on that list? Number 10 raises her hand. Whom do you know?
>
> "Mrs. Eschelman: The Reverend Kutch lived on our street.
>
> "The Court: I couldn't hear you.
>
> "Mrs. Eshelman: The Reverend Walter Kutch. I live on Whitcomb. He was a minister at the church at the corner.

"The Court: Did you say Walter Kutch?
"Mrs. Eshelman: Yes.
"The Court: You know Walter K-u-t-c-h?
"Mrs. Eshelman: I don't know him but I know he was a minister there.
"The Court: He was a minister who lived near you?
"Mrs. Eshelman: On that street.
"The Court: On that street?
"Mrs. Eshelman: Yes.
"The Court: Were you acquainted with him at all?
"Mrs. Eshelman: No, never went to his church, not once.
"The Court: Had you ever met him in a social or informal way?
"Mrs. Eshelman: No, just passing on the street?
"The Court: You have passed him on the street?
"Mrs. Eshelman: I have passed him on the street as a neighbor.
"The Court: As a neighbor; and would your acquaintanceship with Walter Kutch in any way influence your deliberations if you are seated as a juror in this case?
"Mrs. Eshelman: Absolutely not."

[254] From the foregoing there was certainly a showing made by Mrs. Eshelman that (1) Kutch was a neighbor, (2) Kutch was a minister of the church on the corner, (3) she had known him as a neighbor she had passed on the street. The court recalls that Walter Kutch was closely associated with the defendants during the entire trial as appeared by his numerous visits to the court room and conversations with defendants and their counsel in the presence of the court. Inasmuch as counsel had had the jury list previous to trial and the full opportunity had been afforded counsel to study the names on said list, counsel certainly was not precluded from requesting the court to go more fully into Mrs. Eshelman's acquaintance with Mr. Kutch. Defendants have filed an affidavit of Mr. Kutch stating he had known Mrs. Eshelman for approximately

twenty-five years, that he rented a garage from her and her husband twenty-five years ago, and that her husband during the year 1950 asked Kutch for a job on two occasions. Not one item in said affidavit of Walter Kutch is inconsistent with Mrs. Eshelman's answers on voir dire examination. She is not shown to have made a false representation as to the witness Kutch.

Furthermore, Walter Kutch testified on February 1, 1951, which was the third day of the taking of testimony. His close association with defendants, it would seem, would or should have prompted his calling their attention to the fact that Mrs. Eshelman was known to him if his knowledge of her led him to believe she was or would be ——?—— to the defense. Apparently, the defense, having known that Mrs. Eshelman was an acquaintance of Kutch, as a result of her answers on voir dire examination, were willing to take their chances on her being *favorable* to the defense and, therefore, requested no further interrogation of her and were content to let her remain on the jury.

Te defendants also claim that the juror, Mrs. Isabel Eshelman, falsely represented to the court on voir dire examination that (2) "She was not familiar or acquainted with any member of the metropolitan police department of the City of Detroit. In support of this claim defendants filed a purported affidavit of Kathleen S. Frede, the oath to which was administered by Edmund S. Sloman, as notary public, who, at the date of the administering of the oath, January 12, 1952, was an attorney of record in the case as of counsel for defendant, Bessie Lou Tanner Wade. (As such attorney, Mr. Sloman actively participated in the hearing on the Motion for new trial.) This was in violation of Comp. Laws, 1948, Section 60177, Stat. Ann. Section 27.97, which is as follows:

> "It shall not be lawful for notaries public who are attorneys and counselors to administer oaths in causes in which they may be professionally engaged."

Under the circumstances the court cannot consider said purported affidavit of Kathleen Frede. The court has neither found nor been cited a Michigan case exactly in point.

Several Michigan cases hold that the attorney was not disqualified, under the above quoted statute, to administer the oath to an affiant because *at the time* of swearing the affiant the attorney was not the [255] attorney, or the attorney of record, in the cause. *Sullivan* v. *Hall*, 86 Mich. 7; *Allen* v. *City of West Bay City*, 140 Mich. 111; *Thomas E. Lynch & Co.* v. *Wayne Circuit Judge*, 125 Mich. 110; *Rose* v. *Asam*, 240 Mich. 151. In *Thomas E. Lynch & Co.* v. *Wayne Circuit Judge* the court seems to indicate that had the attorney before whom the affidavit for transcript of Justice's court judgment was sworn been an attorney in the cause *at the time* of the taking the affiant's oath, the writ of mandamus would have issued to strike the affidavit from the files.

The courts of other states, *even in the absence of statute* frown upon the practice of a lawyer taking oaths to affidavits, to be used in the cause in which he is an attorney:

*Maples* v. *State*, 131 S. W. 567 (Tex. Cr. App.);
*Savage* v. *Parker*, 43 So. 507 (Fla.);
*Maroosis* v. *Catalana*, 152 N.W. 559 (Neb.);
*Crawford* v. *Ferguson*, 115 Pac. 278 (Okla.);
*City of Chicago* v. *Simonetti*, 203 Ill. App. 279 (Ill.);
*Den ex dem. Hadley* v. *Geiger*, 9 N. J. Law 225 (N. J.);
*City Commission of City of Gallipolis* v. *State*, 173 N.E. 36 (Ohio).

However, at least one court appears to take a contrary view. See *Hulston* v. *Preferred Accident Insurance Co.*, 143 N. W. 566 (Iowa). In *Crawford* v. *Ferguson*, 115 Pac. 278, 45 L. R. A. (N. S.) 519, the Oklahoma Court said:

> "It is a significant fact that twenty-three of these affidavits were acknowledged before the attorney for the petitioner. As this matter has not been passed upon by this court before, we will not do more now than say that the authorities all denounce this practice. If it is permitted, the door is opened to all kinds of impositions and frauds. Such conduct must not be repeated. In the future *such affidavits will not be received or considered*, except as the basis of proceedings against the offending attorney." (Emphasis is writer's.)

In the *Maples case, supra,* the court held (P. 568):

> "Under our statute the court may decide a motion for a new trial or contested issues by means of affidavits or by hearing testimony, of course, the affidavits mentioned in the Statute means such as can be legally taken. An affidavit taken by a party not authorized to administer oaths in the particular transaction would not constitute a legal affidavit, and therefore, not the basis of testimony on objection."

To the effect that affidavits sworn to before attorneys in the cause should be stricken, are the following:

*Maroosis* v. *Catalano,* 152 N.W. 559 (Neb.)
*Maples* v. *State,* 131 S.W. 567 (Tex. Cr. App.)
*Williams* v. *State,* 144 S.W. 623 (Tex. Cr. App.)

[256] It was held in the *Maroosis case,* supra, that under the Nebraska Code "a Notary public who is also an attorney of record in the case is not a proper party before whom affidavits of this kind may be taken, and the affidavit of Maggi *ought to have been stricken from the files.*" (Emphasis is writer's)

The Texas Criminal Court of Appeals has repeatedly held that affidavits taken by the attorney for the accused are not to be considered on a motion for a new trial. *Lamb* v. *State,* 108 S.W. (2d) 1112; *Sanchez* v. *State,* 15 S.W. (2d) 632; *Maples* v. *State,* supra; *Williams* v. *State,* supra. The *Lamb case,* supra (108 S.W. (2d) 1112 at 1114 is especially in point in the case at bar, as appears from the following statement of the Texas Court:

> "Appellant made a motion for new trial, based in part upon alleged misconduct of the jury. He appended to his motion the affidavits of two of the trial jurors. The affidavits were taken before appellant's attorney as a notary public, and, under all the authorities, cannot be considered."

In view of the express terms of the above quoted Michigan Statute and the generally accepted view of the American

Courts, the affidavit of Kathleen Frede, sworn to before Attorney Sloman, an attorney of counsel for a defendant in this cause, cannot be and is not considered by the court.

4a—Supplemental

4a. The defendants' claim that the court erred in asking the following question of the jury on *voir dire:*

> "Would any acquaintanceship that you have in the police department in any way cause you to be embarrassed by reason of any defense that the defendants might make? If so, raise your hand if you feel at all embarrassed to set on a jury under those circumstances. No hands raised."

is wholly untenable for the reason that this question was asked immediately *after* and pursuant to the following statement and request of defense counsel (page 56 of transcript of proceedings of January 26, 1951):

> "Mr. Davidow: Well in view of one of the matters of the defense which will be the conspiracy on the part of officials of the police department to do harm and injury and frame the defendants, whether the knowledge or acquaintanceship with these police officers or officials would in any way be embarrassing to them by reason of the charge we make against their behavior."

[257] Having requested such a question and not having taken any exception to the question as asked by the court and not having suggested any change or variation therein, defendants' counsel cannot now be heard to complain. The court submits that the question as asked fairly contains the substance of counsel's request.

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[259] 10—Supplemental

10. This claim of error based on the asserted refusal of the court to "ask the prospective jurors whether they had heard any discussion of (sic) expression on the alleged

guilt of defendants and whether as a result of same they had formed any opinion in the case", apparently refers to what took place in chambers when Mr. Davidow reported he had information that Jack Friedman, one of the People's witnesses, had been seen talking to one of the jurors on the panel in the courtroom (transcript pages 130, 131, 132, January 26, 1951). Mr. Davidow requested the court to ask all the jurors:

> "Whether they have heard this discussion, or whether as a result of such discussion they have formed any opinion one way or the other in this case."

The court suggested that Mr. Davidow's informant be called in and interrogated under oath. Mr. Davidow then stated to the court, "I think Mr. Jack Friedman should be called in and asked about it", and then the following took place (page 131 transcript of January 26, 1951):

> "The Court: If you call the person who reported it first, then I will have that. I will put him under oath and I will know what is being done.

[260] Mr. Davidow: I am in no position to do that now, Your Honor.

The Court: There is nothing further to do.

Mr. Davidow: It was given to me under circumstances I consider absolutely reliable.

The Court: That may be but now, Mr. Davidow, there is no use of our having any question on this record. I haven't any question about your integrity and I am, I have not certainly raised it, but you know as well as I do that the court has to proceed in the way on the basis of testimony. Now, something has been reported to you. I have a right, if I am to act upon hearsay, to go to the bottom of hearsay first and determine what I am going to do about it. Now, either we won't have anything further said about it or let's have the people in. I am willing to investigate the whole matter but I am going to do it with people under oath.

Mr. Davidow: I am in no position to give you that information now."

From the foregoing it is evident that defendants' counsel requested the court ask the jurors a question which presupposed that a discussion had taken place between witness Friedman and a juror in the presence of other jurors. The court obviously sought to determine first whether such a discussion *had* taken place, especially since Mr. Davidow did not claim to have seen or heard it. It was then proper for the court to insist that Mr. Davidow's informant be brought before the court so that the court could first determine (before interrogating the jury) whether such a discussion actually had taken place. Certainly, if it developed that no discussion had taken place it would have been improper for the court to have interrogated the jury concerning a non-existent discussion. Since Mr. Davidow was unwilling to reveal the source of his claimed information the court did not abuse his discretion in refusing to proceed further in the matter.

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[262] 18—Supplemental

18. This objection concerning testimony of purchase of furs by defendant, Morrison T. Wade for his wife, the other defendant, is referred to in paragraph 36 of the original motion and discussed in paragraph 36 (original) hereinbefore. The present objection contains misstatements, such as "that it stands uncontradicted and unchallenged in the trial, whatever moneys Morrison T. Wade withdrew through checks issued by the Society of Good Neighbors, were charged to his account as salary . . . that he had sufficient sums due him to offset any checks so issued for him". On the contrary the prosecution contended, and there was testimony tending to show that checks were issued for Wade's personal use which were *not* charged to his salary account but were charged to "contribution and promotion" and so indicated in at least two of the Society's income tax returns. Furthermore, there was a sharp issue of fact as to defendants' claim Wade had sufficient sums due him to

offset any checks so issued to him or for his personal expenses. There was abundant testimony to the effect that for more than one year Wade was charged with an overdraft on the Society's books at the same time that these Society checks were being drawn to pay for his personal expenses such as for furs bought from E. C. Dittrich & Co. for his wife, a $100.00 hat bought from Capper and Capper, personal telephone bills, expenses of Chase-Wade Corporation, etc. The Society's federal income tax return for 1944 (Exhibit 155B) showed under the heading "other operating, Administrative, and overhead expenses" an item of "contribution promotion—$9,346.68" which consisted principally of checks for the Wade's personal expenses. If this were money properly due Wade for salary it should have been so indicated in the return. A like situation existed in the 1946 return of the Society (Exhibit 155) where the "contribution promotion" item was $9,125.12. If this were properly chargeable to salary to Wade it should have been so listed. The jury could properly have found this to have been a wilful concealment by defendant, Morrison T. Wade.

Check for $101.12 to the Detroit Auto Club Travel Bureau (Exhibit 92AQ) was charged to "cont & Pro", i. e. "contribution and promotion." A check (Exhibit 122-A) dated March 30, 1946 to Saks Fifth Avenue for $575.89 was likewise charged to "contribution and promotion". There was also testimony that the Society's check (Exhibit 128-A) dated April 25, 1946 in sum of $249.96 payable to Capper & Capper, a men's furnishing store, and a check for $471.60 (Exhibit 107-X) and one for $72.06 (Exhibit 99) were applied on M. T. Wade's account at Capper & Capper which covered such items as 24 week-end brushes, the price of which was $300.00, and a $100.00 hat, all of which items Mr. Wade testified to having purchased.

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[263] 22—Supplemental

22. The claim that the court erred in permitting testimony concerning bingo is untenable. The testimony showed that the bingo games were run at the Moose

Temple in the name of the Society during one period as often as three nights per week, that no account was kept of the *gross* receipts thereof; that Morrison T. Wade had charge of the black bag in which the nightly bingo moneys were placed after payments were made to bingo helpers, floorworkers, etc. of which said payments no ledger or other bookkeeping entries were made; that a sandwich bar or pantry was operated in the Society's name at the Moose Temple on bingo nights; that, according to the letter from George Alder, assistant to Morrison T. Wade, to the Office of Price Administration, relative to the food needs of the pantry, as high as one thousand persons per night attended the games; that, according to the testimony of Charles Fabian, he heard Wade say the next morning after a game that the "take" tne night before had been $13,000; that a financial statement furnished the Detroit Police Department of the bingo transactions for the one period the receipts were $32,135.55 of which it was claimed only $917.55 was profit; that, in spite of the fact of this one rather detailed statement of the bingo games for this period *which actually showed gross* receipts there were no where in the ledgers or books of the Society any entries either of these gross receipts or any other gross receipts from bingo. The foregoing items of testimony by no means are all inclusive but are sufficient to indicate that the testimony concerning the bingo games was relative, material, and competent as far as a consideration of the Society's books, Wade's connection therewith, especially as reflecting that Wade and his wife, through the use of the Society name and organization were engaging in enterprises the funds of which were only partially accounted for in the Society books which were controlled entirely by the Wades.

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[264] 27—Supplemental

27. The court did not err in refusing to permit a comparison of the Society of Good Neighbors with other charitable organizations. This claim of error is set forth as being based on the "transcript of proceedings of June 13,

1951, page 10 et seq". Beginning with the first question on page 10 thereof which is a question asked on direct examination of Jack D. Friedman, [265] an auditor, by assistant prosecutor Bolio, the transcript is as follows:

> "Q. Mr. Friedman, is there any difference in auditing the books of this type of business and any other type of business?
>
> The Court: Well, I don't know why they should get in for comparison of other types of business.
>
> Mr. Bolio: Just as far as auditing practices is concerned, if the court please.
>
> The Court: No.
>
> Mr. Davidow: I should like to have it, Your Honor.
>
> The Court: We have got enough here to handle with the case that is before us. I'm not going to permit that door to be opened by anybody. We aren't in the business of comparing other people.
>
> Mr. Bolio: With the court's suggestion, I will withdraw the question."

From the foregoing it is obvious that the court stopped the prosecution from going into a comparison of "auditing the books of this type of business and any other type of business". There is no mention here of a comparison with "other charitable organizations". The court ruled that such comparisons were not to be permitted, which was not error.

The court on other occasions sustained objections to attempts by defendants to offer or adduce testimony of bookkeeping practices, handling of needy cases, collection of merchandise for the needy, operation of bingo games of the Society of Good Neighbors as compared with other charitable organizations in the Detroit area. In this was no error. To have permitted such comparisons would have interminably lengthened the trial by the introduction of immaterial issues. That someone else or some other organization has operated or acted the same as the accused certainly is no test of fraud or the elements of any crime.

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[275] 41—Supplemental

41. This claim of error as to an asserted failure by the court to apply a rule of law is untenable. Defendant testified, in part,

> "Our offices were broken into. Our files were rifled, many of them scattered on the floor, not case work files but business files, desks were rifled, the desk of office was rifled and the papers strewn all over. Occurred twice prior to February 3, 1948 . . . I took it up with the Police Department once, and they never did send a car over . . . I telephoned downtown here personally, and the second time based on the experience we have had elsewhere than there, we came to the conclusion that it was no use to call the police."

And Mr. Wade further testified that his home at Cass Lake had been entered and papers rifled and strewn over the floors, but nothing of tangible value taken; that the State Police had responded to the call of a neighbor, had looked around the windows [276] and had driven off; that he had telephoned the State Police, a man answered and said "Is this the fellow that had all the publicity in the papers?", that he (Wade) responded, "Yes", that the voice said, "That is a phoney call, you haven't had anything happen down there", that he (Wade) said, "Well, those jimmie marks on the front door certainly are not my imagination", and the voice answered, "We think it is a phoney call". Attorney Davidow stated to the court, "In my judgment it was the Police Department . . . and I shall so argue to the jury at the proper time, and the facts abundantly disclose it." The prosecution moved to strike the testimony on which motion the court withheld decision pending its being connected to anything material in the case. Morrison T. Wade then testified that his mother's car which was parked in front of the Wade home during the Grand Jury investigation during a week-end visit, was broken into and certain items, including the family Bible, some books and records, his father's Shrine fez and Knights Templar equipment removed and stated, "When next we heard about them they were in the Grand Jury." On ob-

jection of the prosecution and after a colloquy between counsel and court as to whether the testimony was that he *saw* these articles in the Grand Jury, the court ordered stricken as hearsay this statement as to hearing about them in the Grand Jury.

Mr. Wade also testified that Holiday House, a Wade enterprise, was ransacked approximately five times and the police were called and made an investigation.

After extended argument and citation of authority the Court held,

> "The Court: The Court has before it the transcript of a portion of the—I should say examination, it says cross-examination, the examination of Defendant Morrison T. Wade by Mr. Davidow concerning this portion or covering this, the proceedings pertinent to the motion to strike made on behalf of the Prosecution. The Court examined this, has examined this transcript and remembers also what the Court had heard which is substantially the same, of course, as the transcript indicates. There was no testimony tending to connect the Police Department with these breakings and enterings to which the defendant testified. I see no place whatsoever that there is any connection. The nearest that it comes to any testimony whatsoever, even about the police reaction, is testimony concerning conversations. One of them is that the state police without naming the state policeman, said to Mr. Wade, "We think it is a phoney call", with reference to the report of one of the claimed breakings and enterings.
>
> Secondly, there is—or strike the word secondly. Of course, that in no way connects [277] the police, either the state police or the Detroit City Police Department, with any affirmative act of breaking and entering on the premises of the defendant. There is no testimony whatsoever on which even an inference could be raised that it was the police that did it, as far as that piece of testimony is concerned.
>
> With respect to the testimony of Mr. Wade concerning a conversation, apparently a conversation at least with a Mr. Long who is identified in the record as having been Mr. William P. Long, one of the assistant

prosecuting attorneys assigned to the Groat one-man grand jury, I am reading that from page 16 of this excerpt before me, Mr. Wade's testimony in part was:

"Question (By Mr. Davidow) What is your recollection of what Mr. Long said?

Answer: He said any time I wanted to pick up the stuff, they would give it to me, but they never did."

Now, there is no connection between the word "stuff" and any claimed articles taken by way of any descriptive words or identifications of words. On two or three of these occasions of the breakings and enterings there was nothing tangible taken, at least so far as the record shows.

There was, according to the testimony on page 14, a breaking into of Mr. Wade's mother's car, and records—no, strike that, "the family bible, some of her books and records, my father's shrine Fez from the Sagasic Temple, his Knights of Templar, some of his Knights Templar equipment which she was taking to give part of it to my two sisters to give as keepsakes from Dad, were removed from the car," according to this testimony of Mr. Wade's, and further according to his testimony quoting, "and when next we heard about them they were in the grand jury."

Now, there is—the breaking and entering of a car for the removal of Knights Templar equipment by the Police Department is not shown by any stretch of the imagination here. There is no testimony here of any of the police being present, and there is no showing that the police were present, as I say, at that time or that any description of the "stuff" the word "stuff" refers to anything alleged to have been taken. The motion to strike, therefore, I think is well taken for the reason that there is no testimony of probative force connecting the claimed [278] breakings and enterings with any conspiracy on the part of the Police Department or any breaking and entering concerning which testimony has been had, with any affirmative act by the Police Department of a breaking and entering nature."

The court still considers the granting of the motion to strike was proper. See *People* v. *Brunstein*, 261 Mich. 535 at 537.

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[297] Dated: March 12, 1953
Detroit, Michigan

/S/ JAMES R. BREAKEY, JR.
*Circuit Judge*
*Acting as Recorders Court*
*Judge.*

# APPENDIX B

## 1. One-Judge Grand Jury Statute

*As amended by Act. #276, Public Acts of Michigan of 1951.* (*Amendments are italicized.*)

Sec. 3, Chapter 287 Code of Criminal Procedure, M.S.A. § 28.943. Proceedings before trial; investigation of suspected offenses by judge *of court of record;* inquiry; witnesses; *participants in inquiry, disqualification from appointment or election.*

Whenever by reason of the filing of any complaint, which may be upon information and belief, *or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record* shall have probable cause to suspect that any crime, offense or misdemeanor shall have been committed within his jurisdiction, *and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry: Provided, That in any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court. Thereupon such judge shall require such persons to attend before him as witnesses and answer such questions as such judge may require concerning any violation of law about which they may be questioned within the scope of the order;* and the proceedings to summon such *witness* and to compel *him* to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall *not receive any compensation or remuneration other than witness fees as paid witnesses* in other criminal proceedings, *and said witnesses shall not be employed in any capacity by the judge or any person connected with such inquiry, with-*

*in the scope of the said inquiry being conducted.* Whenever a subpoena shall be issued by the *judge* conducting such inquiry, commanding the appearance of a witness before such *judge* forthwith upon the service of such subpoena, and, following the service thereof, such witness arrives at the time and place stated in such subpoena, the *judge* so issuing the same shall be *forthwith* notified of such *appearance* by the officer serving the subpoena, and it shall thereupon be the duty of such *judge forthwith* to appear and take the testimony of such witness. *Any person called before the grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. All matters so revealed to the attorney shall be subject to the requirements of secrecy in section 4, and any revelation thereof by the attorney shall make him subject to punishment as provided in said section. No testimony shall be taken or given by any witness except in the presence of the judge.*

Any *judge,* prosecuting *attorney* or special prosecuting *attorney,* or the attorney general participating in any inquiry under this section which continues more than 30 calendar days shall thereafter be disqualified from appointment or election to any office other than one held at the time of such inquiry: Provided, That such disqualification shall not extend more than *1* year from date of termination of such inquiry, as determined by final order of said *judge* entered prior to such date.

Sec. 4, Chapter 287, Code of Criminal Procedure, Sec. 28.944, Michigan Statutes Annotated:

Title: Same; apprehension of suspected person; *disqualification of investigating judge in later proceedings;* removal of public officers, procedure; disclosure of *information, exceptions, penalty; report of no finding of criminal guilt; limitation of period of inquiry; inability to continue inquiry; appointment of successor judge.*

If upon such inquiry the *judge* shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, *he* may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the *judge* having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint: Provided, That the *judge* conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5 hereof, *except alleged contempt for neglect or refusal to appear in response to a summons or subpoena.* And if upon such inquiry the *judge* shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance *in* office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said *judge* shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law of conduct removal proceedings against said officer .... *Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before such judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state,* any *judge* conducting such inquiry, any prosecuting attorney and other persons who may at the discretion of such *judge* be admitted to such inquiry, who shall *while conducting such inquiry or while* in the services of *such*

*udge* or after his services with *such judge* shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in any such inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or *under* recognizance, or who shall disclose that any person has been questioned or *summoned* in connection with such inquiry, or who shall disclose or publish or cause to be published any of the proceedings of such inquiry otherwise than by issuing or executing processes prior to such indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related thereto, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 or more than *$1,000.00* or both such fine and imprisonment in the discretion of the court, and such offense when committed by a public official shall also constitute malfeasance in office."

Same: apprehension of suspected person; removal of public officers, procedure; disclosure of statement.

If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis of removal of

said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors.

**2. The Fourteenth Amendment to the Constitution of the United States**

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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MAY 31 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

October Term, 1954

No. [redacted] 43

On Appeal to the Supreme Court of the State of Michigan

MORRISON T. WADE AND BESSIE LOU WADE,
*Appellants*

v.

THE PEOPLE OF THE STATE OF MICHIGAN,
*Appellee.*

# MOTION TO DISMISS

Thomas M. Kavanagh
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan

Daniel J. O'Hara
Assistant Attorney General

Counsel for Appellee
The Capitol, Lansing 2, Mich.

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In the Supreme Court of the United States

October Term, 1954

No. 692

On Appeal to the Supreme Court of the State of Michigan

**MORRISON T. WADE AND BESSIE LOU WADE,**
*Appellants*

v.

**THE PEOPLE OF THE STATE OF MICHIGAN,**
*Appellee.*

## MOTION TO DISMISS

The People of the State of Michigan, appellee herein, respectfully moves that the appeal of Morrison T. Wade and Bessie Lou Wade, appellants, be dismissed on the following grounds:

1. In their notice of appeal (Appendix "A," post, p. A-1) and amended notice of appeal (Appendix "B," post, p. A-7, filed with the clerk of the recorder's court of the city of Detroit, designating among other things the judgment or part thereof appealed from, Revised Rule 10, appellants appealed to this Court "from the final order of the Supreme Court of Michigan denying their petition for reconsideration of the denial of their application for leave to appeal, entered on October 20, 1954," an order not reviewable under 28 U.S.C. § 1257 (2).

2.

(a) The first two questions set forth in appellants' amended notice of appeal (Appendix "B," post, p. A-9), are not expressed "in the terms and circumstances of the case," as required by Revised Rule 10 (2) (c).

(b) The third and last question set forth in appellants' amended notice of appeal, together with its 4 subsidiary questions, does not involve "the validity of a statute" of the State of Michigan "on the ground of its being repugnant to the Constitution, treaties or laws of the United States," 28 U.S.C. § 1257 (2), but comprises a question more appropriately to be considered on petition for certiorari, 28 U.S.C. § 1257 (3).

(c) The first question presented in appellants' jurisdictional statement, p. 3, is not "expressed in the terms and circumstances of the case," as required by Revised Rule 15 (1) (c) (1).

(d) The remaining questions presented in appellants' jurisdictional statement, p. 3 and p. 4, are additional to those set forth in their amended notice of appeal (Appendix "B," p. A-7), contrary to Revised Rule 15 (2).

3. No substantial federal question is presented for review under 28 U.S.C. § 1257 (2).

## ARGUMENT

1

In their jurisdictional statement, p. 2, counsel inadvertently allege "this is an appeal from a sentence of conviction

in the Recorder's Court of the City of Detroit," though this is not precisely correct. While a formal notice of appeal and an amended notice of the same tenor were timely filed with the clerk of the recorder's court of the city of Detroit as the court possessing the record, the appeal so taken is from the Supreme Court of the State of Michigan. We publish as Appendix "A," post, p. A-1, a true copy of the notice of appeal so filed, and as Appendix "B," post, p. A-7), a true copy of the amended notice of appeal. In each instance the opening paragraph reads:

> "I. Notice is hereby given that Morrison T. Wade and Bessie Lou Tanner Wade, the defendants above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Michigan denying their petition for reconsideration of the denial of their application for leave to appeal, entered on October 20, 1954."

Such appeal was taken pursuant to 28 U.S.C. § 1257 (2) which reads as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) .....

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

While we do not desire to quibble or take advantage of a mere technical error in procedure, and although counsel

may have intended to take an appeal from the conviction and sentence of the trial court, we nevertheless conceive it our duty to invite attention to the following.

A. Michigan law provides:[1]

> "Sec. 3. Writs of error in criminal cases shall issue only in the discretion of the supreme court or any justice thereof, on proper application."

And Michigan Court Rule 60, § 2, maps procedure on application for leave to appeal in such cases. Appendix "C," post, p. A-13.

Thus it follows that when, on the 11th day of June 1954, appellants filed their application for leave to appeal, the privilege was one of grace and discretion rather than of right.[2]

B. Decisions of this Court bear out a recent text-book statement, Stern's Supreme Court Practice (2d Ed. 1954), p. 78, to the effect that if the highest court of a State declines to review a case, the trial court's judgment becomes that of the highest court in which decision could be had.[3] And a quite recent opinion bears this out,

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[1] Mich. Code of Criminal Procedure, Chap. X, § 3 [Comp. Laws 1948, § 770.1 (Mich. Stat. Ann. [Henderson] § 28.1100)].

[2] On the 13th day of August 1954, Michigan Public Act No. 53 of that year became effective, providing inter alia that writs of error might issue as of course out of the Supreme Court to review final judgments "in all criminal cases involving the personal liberty of a party thereto." In their motion to reconsider, appellants directed attention to this subsequent Act, but the Court rejected it. Moreover, the constitutional validity of Act 53 of 1954 is presently challenged in a cause pending in the Michigan Supreme Court.

[3] Citing: Minneapolis, St. P. & S.S. M.R. Co. v. Rock, 279 U.S. 410; Virginian R. Co. v. Mullens, 271 U.S. 220.

*Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 159-160.

In the case at bar, upon application of these appellants, the Michigan Supreme Court denied leave to appeal and later refused to reconsider the matter. From this final order appellants appeal to this Court. And this Court is now called upon to determine whether jurisdiction now lies to review the conviction and judgment of the trial court despite the error in the notice to appeal.

**2**

A. While Revised Rule 10 discourages unnecessary detail in setting forth the questions presented in a notice of appeal, although the statement of such questions should be short and concise, and while the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein, nevertheless the rule does require that questions be "expressed in the terms and circumstances of the case."

We respectfully suggest that the first two questions set forth in appellants' amended notice of appeal (Appendix "B," post, p. A-12) do not meet this requirement of the rule.

Question "1" merely asserts in substance and effect, without any relation to the terms and circumstances of the case, that Michigan's 1-Man Grand Jury Law (citing it) "is repugnant to Section 1, Article XIV of the Amendments to the Constitution of the United States, and therefor is unconstitutional. And it fails to state in what manner violence was done to the Due Process Clause.

Question "2" is still more vague and indefinite in that it merely asserts, without any explanation whatsoever, that the Act challenged, is repugnant "to Section 4 of Article IV of the Constitution of the United States."[4]

B. The remedy here invoked is appeal rather than certiorari and in filing their notice of appeal the appellants have chosen a road to travel into this Court. They cannot change the signposts.

An appeal under 28 U.S.C. § 1257 (2) may be taken only where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The third question set forth in appellants' notice of appeal is based on the claim that they were denied equal protection of the laws and were deprived of their liberty and property without due process of law in violation of the 14th Amendment by reason of certain specified "substantial errors" numbered from (1) to (4), inclusive (Appendix "B," post, p. A-8. Such "substantial errors" presumably occurred in the course of criminal proceedings commencing with the empaneling of a petit jury, indeed, points 1, 2, and 3 have to do with the conduct of the jury.

Boiled down, such claims of error are these: (1) the misconduct of a juror in the commission of perjury upon her voir dire examination; (2) alleged illegality in assembling a list of jurors for the panel; (3) alleged tampering with the jury by members of the Detroit police department; and

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[4] It goes without saying of course that enforcement of this constitutional guaranty of a republican form of government is for Congress, not the courts. State of Ohio ex rel., v. Akron Metropolitan Dist., 281 U.S. 74. How it may be applied to the case at bar is not disclosed by the question stated in the notice of appeal.

(4) a shift in the theory of the prosecution as the trial proceeded. All of which are alleged to have resulted in a miscarriage of justice.

It requires little, if any, effort to demonstrate that in assigning such errors, the appellants have failed to draw in question the validity of any statute of Michigan on constitutional grounds.

C. The first question presented in appellants' jurisdictional statement, p. 3, like its predecessor in their notice of appeal, is not "expressed in the terms and circumstances of the case," as required by Revised Rule 15 (1) (c) (1).

That question reads:

> "1. Does the Michigan judge-grand jury statute, either generally or as applied in this case, violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?"

It is quite true that this question as stated, unlike its counterpart in the notice of appeal, reads "as applied in this case," and it might possibly be said that it should pass muster for that reason, though here again it indicates absolutely nothing concerning "the terms and circumstances of the case."

D. The trouble is, however, that while in Questions 2, 3, 4, 5, and 6, counsel proceed to elaborate upon the theme of Question 1, they state questions not covered in their notice of appeal. The third question set forth in such notice (which as we have seen assigns 4 irrelevant errors having no relation to the 1-Man Grand Jury Law) is wholly abandoned and in its place we find 5 constitutional questions which were not defined in the notice of appeal.

Again not desiring to be considered overly-technical, we most respectfully submit these questions of jurisdiction to the Court.

3

Assuming for the sake of argument that appellants' notice of appeal is in order, and that the questions presented in their jurisdictional statement are consistent therewith, we would respectfully suggest that no substantial federal question is involved.

We do not deem it appropriate in a motion to dismiss, to enter into a full discussion of the merits, nor do we deem it essential to such purpose that we point out inaccuracies or omissions in appellants' statement of the case. To do so would require an exhaustive review and analysis of the record.[5] Suffice it to say that each of the following points stressed by counsel bears its own peculiar infirmity:

A. Contending that Michigan's "One-Judge Grand Jury System is not in accord with Due Process of Law," appellants argue somewhat as follows:

1. It is said that "indictment by the court destroys the presumption of innocence." The trouble with such a conclusion is that despite counsel's criticism of the system, a 1-man grand jury inquiry culminates in no more than a warrant authorizing arrest.

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[5] While the record in this cause as so far compiled, comprises in part the concise statement of facts and proceedings certified by the trial judge, upon which the Michigan Supreme Court passed in denying leave to appeal, and though it covers 461 or more typewritten pages, many of the questions presented could not possibly be answered without the benefit of the nisi prius record.

Although the word is frequently used in connection with this law, the 1-man grand jury procedure does not lead to an "indictment" and immediate trial but merely culminates in the issuance of a warrant authorizing the apprehension of an accused person in order that he may be brought before a magistrate for a preliminary examination to determine whether an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith. If the magistrate so finds, he "shall forthwith bind such defendant to appear before" a court of competent jurisdiction for trial.

We therefore publish as Appendix D, a true copy of §§ 1-5, incl., and § 13 of Chapter 6 of the Michigan Code of Criminal Procedure, captioned "Examination of Offenders" [Comp. Laws 1948, §§ 766.1-766.5 and 766.13 (Stat. Ann. 1954 Rev. §§ 28.919-28.923 and 28.931)].

Counsel argue, p. 12, that when a judge-grand-juror issues process, he in effect "declares that his plenary inquisition has demonstrated the probable guilt of the accused," thus destroying the presumption of innocence. But the statute, § 4 provides that such a judge need only be satisfied that a crime has been committed and that "there is probable cause to *suspect* any person or persons to be guilty thereof." [Emphasis, ours].

Since such process merely brings the accused before a magistrate for a preliminary examination to determine whether probable cause exists to hold him for trial, appellants' argument places undue emphasis on the initial step in a criminal prosecution, for after all a judge who issues a warrant after conducting a 1-man grand jury investigation, is no more than a magistrate.

Moreover, in the case at bar, although the warrant was issued by the Honorable Gerald W. Groat, the judge who conducted the investigation,[6] the preliminary examination of the defendants was conducted by the Honorable George Murphy, another member of that court (R. 37), while further preliminary motions were heard by Judge John P. Scallen (R. 39). Several years after the warrant issued, a jury was impaneled before a visiting circuit judge from the county of Washtenaw, who had been assigned to the task by the presiding judge of the State.[7]

This Court in a recent decision, *Frisbie v. Collins,* 342 U.S. 519, 522, held that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction, and, in the course of an opinion written by Mr. Justice Black, it was said that.

> "due process of law is satisfied when one present in court after being fairly apprised of the charges against him and after a fair trial in accordance with constitutional safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."

It has also been held that due process does not require the State to adopt a particular form of procedure, "so long

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[6]

During such investigation, the matter came before this Court on a collateral issue. Morrison T. Wade v. The People of the State of Michigan; No. 453, October Term 1948; certiorari denied, 336 U.S. 924; rehearing denied, 336 U.S. 947.

[7]

This would seem to satisfy due process as defined In the Matter of Murchison and White, No. 405 October Term 1954.

as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution."[8] Nor does it require an examination, or the opportunity for one, prior to a formal accusation by the district attorney by information.[9]

We therefore respectfully suggest that the method by which a warrant authorizing an arrest is issued, if followed by a fair trial, does not deny due process of law.

2. Once again we are confronted with the claim that Michigan's 1-man grand jury system invades the independence of the judiciary by commingling the investigative and adjudication functions.

The trouble with such an argument when addressed to this Court, is that it cannot be based upon the Federal Constitution but is a problem controlled by state law.

*Dryer v. Illinois,* 187 US 71, 84;
*Crowell v. Benson,* 285 US 22, 57;
*Highland Farms Dairy v. Agnew,* 300 US 608, 612.

Moreover, the highest court of the State has held,

*In re Slattery,* 310 Mich 458; cert. den., 325 US 876,

that a grand juror proceeding under this act is a judicial officer, not a prosecuting attorney, policeman or detective,

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[8] Rogers v. Peck, 199 U.S. 425, 433; f. in Garland v. Washington, 232 U.S. 642, 645-646.

[9] Woon v. Oregon, 229 U.S. 586 (f. in People v. McCrea, 303 Mich. 213, 248; certiorari denied, 318 U.S. 783). Please see also, Barber v. United States, 142 F. 2d 805, 807; Snell v. Mayo, 173 F. 2d 704; certiorari denied, 338 U.S. 905.

and that the statute in question does no violence to Article IV of the State Constitution.

The Michigan statute, in operation, is not subject to the condemnation of Judge Cardozo leveled upon the proceedings involved

*In re Richardson,* 247 N.Y. 401.

As noted in the opinion written by Mr. Justice Butzel In the case of *Slattery, supra,*

> "The sole issue in the *Richardson Case* was whether a New York statute which provided that the governor of New York, in a proceeding before him for the removal of a public officer, might as governor take the evidence, or at his option direct that the taking of proofs be delegated to a judicial officer or commissioner for the purpose of taking testimony and reporting his findings to the governor. The law was held to be unconstitutional on the ground that it was a delegation of the administrative powers to the judiciary."

This rule cannot be applied to Michigan's 1-man grand jury proceeding, however, for under that act as under the Federal system, the proceeding before a grand jury constitutes a judicial proceeding, *Cobbledick v. United States,* 309 U.S. 323.

Furthermore, under Michigan's system, justices of the peace, circuit judges and justices of the Supreme Court are deemed conservators of the peace within their respective jurisdictions. Const. Mich. 1908, Article VII, § 18.

Petitioners here, as did counsel in *Slattery, supra,* probably will claim that the office of conservator of the peace

is a different position from that of a judicial officer. But the Michigan Supreme Court in the case of *Slattery* set the question at rest, 310 Mich. at 466. And it should be observed that Judge Cardozo *In re Richardson*, 247 N.Y. at 412, pointed out by way of analogy that a magistrate before whom there is laid an information of the commission of a crime, conducts a *judicial inquiry* when after finding that a crime has been committed, and that there is reasonable cause to believe that the defendant has committed it, he issues a warrant of arrest.

B. Finally, it is contended that as applied the 1-man grand jury system deprived the appellants of due process of law, and to support this claim counsel make several assertions which could scarcely be characterized as understatements.

1. It is said, p. 18, that appellants "were condemned long prior to the petit jury trial by the Recorder's Court itself," whereas, as a matter of fact, the court itself did not condemn them but one of its members merely found sufficient cause to issue a warrant authorizing their arrest on a criminal charge.

Counsel also say that "when the case was brought to trial appellants were already under the cloud of a judicial finding of probable guilt." The answer is that this would apply to any person accused of crime in a warrant issued by a magistrate.

2. Appellants also complain that the trial judge himself emphasized the high source of the original charge, when he instructed the jury they had no "right to be influenced by the fact that the defendants have been brought into this court through the action of a one-man grand

jury." This charge of the court was designed, we submit, for the protection of the defendants, not to prejudice their cause, and a somewhat similar instruction was included in appellants' request to charge (No. 2. R.p. 347). Moreover, this short excerpt from the trial judge's instructions should be considered in the light of the entire charge to the jury (Exhibit T, R.pp. 374-451) rather than as wrested from its context.

Further points attempted to be made should not be considered on appeal. They do not involve the validity of the 1-man grand jury statute.

WHEREFORE, appellee respectfully moves that the within appeal be dismissed.

Thomas M. Kavanagh
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan

Daniel J. O'Hara
Assistant Attorney General

Counsel for Appellee
The Capitol, Lansing 2, Mich.